Supreme Court, U.S.
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No. 93-1983

In The

Supreme Court of the United States

October Term, 1994

RHONDA J. PARRISH,

Petitioner,

vs.

RIVERVIEW NURSING HOME, INC., et al.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER MAGISTRATE JUDGE KEMP COMMITTED ERROR AS A MATTER OF LAW BY USING THE *McDONNELL DOUGLAS* ANALYSIS IN A TITLE VII RACIAL DISCRIMINATION CASE WHERE THERE WAS NO DIRECT EVIDENCE OF DISCRIMINATION.

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STATEMENT OF THE CASE

This is an employment discrimination case which was filed pursuant to Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e *et seq.* Petitioner Rhonda Parrish ("Parrish") was formally employed as a charge nurse by Defendant Riverview Nursing Home ("Riverview"). Parrish was terminated from that position on March 8, 1989 by Riverview's Director, Joe Pino ("Pino"), and contends that her dismissal was motivated by racial animus.

This action was referred to Magistrate Judge Kemp for the holding of an evidentiary hearing and the issuance of a Master's Report pursuant to 42 U.S.C. § 2000e-5(f)(5). Magistrate Judge Kemp issued a Master's Report on September 23, 1992, in which he recommended that Parrish's "complaint be dismissed with prejudice, and that judgment be entered in favor of Defendant, Riverview Nursing Home." (R. 60: Master's Report, p. 29, at B-26 of Petitioner's Appendix).

On November 9, 1992, Parrish filed several objections to the Master's Report (R. 65), and on December 8, 1992, Riverview filed a Memorandum in Opposition to Parrish's Objections. (R. 67). On December 29, 1992, after careful consideration of the evidence, United States District Judge Sandra Beckwith adopted the "extremely well-reasoned report" of Magistrate Judge Kemp. (R. 68). On January 29, 1993, Plaintiff timely filed a Notice of Appeal.

On March 4, 1994, the United States Sixth Circuit Court of Appeals issued a bench decision finding that Parrish suffered no discrimination in her employment, and further that Parrish "failed to prove that discrimination on the basis of her race played a substantial part in the decision to terminate her employment." (6th Cir. Ct. of Appeals, Bench Decision, at A-4 of Petitioner's Appendix).

STATEMENT OF FACTS

The statement of facts as set forth in the Petitioner's Brief is nothing more than a selective presentation of the facts that are arguably in her favor. Further, Petitioner's

Brief is replete with allegations and contentions that are unsupported in the record and which otherwise have no bearing on the important question in this case – whether Rhonda Parrish was terminated for violating a specific company policy or was that merely a pretext? Petitioner simply ignores evidence which directly contradicts her allegations and which support the Master's well-reasoned decision.

Because of federal and state regulations pertaining to the administration of narcotic drugs, such substances are required to be kept in a locked cabinet separate from other medications, and a written record showing the dispensing of and inventory levels of such drugs is required to be kept. As such, the nurses at Riverview are required to do a narcotic count at the beginning of their shift. Such procedures are typically learned by licensed practical nurses during their education and training, and the importance of maintaining an accurate record of narcotic drugs was known to all of the charge nurses at Riverview prior to such drugs being introduced into the facility in October of 1988. (Tr. II-26; Tr. II-182).

Throughout the entire trial of this matter, the *only* allegation of disparate treatment concerned the timing of when Parrish was required to do the narcotic count. Petitioner could only point to *one* circumstance in which she was allegedly treated differently than white nurses:

> Q. And that the only issue that you can recall where you have been treated differently than white employees is having to sign a narcotics sheet and to do the count at the beginning of your shift; isn't that correct?
>
> A. That is what I said.

(Parrish at II-73.)

This testimony is supported by Petitioner's charge of discrimination with the Ohio Civil Rights Commission, in which she stated: "I was the only black charge nurse, and also the only one required to sign a narcotics sheet upon arriving at work; *the others could sign the sheet at their leisure.*" (Plaintiff's Exhibit 2) (emphasis added).

However, contrary to Parrish's contention, all of the charge nurses at Riverview, including Parrish, knew that the narcotic count was to be done at the "beginning of the shift." (Jaye Bennett White: "It is the responsibility of the oncoming nurse to do the narcotic count at the *beginning of their shift*" (Tr. I-125) (emphasis added); Martha Duff: "What I can remember, I don't think I can remember all of the specifics, but when you come in *at the beginning of the shift* to count them and sign and how many there were" (Tr. III-168) (emphasis added); Katherine Bradley: "All nurses were required *at the beginning of their shift* to do the narcotic count while the other nurses were still present" (Tr. III-117) (emphasis added); Roxanne Butto: "The oncoming nurse counts the narcotics prior to the off going nurse, before she leaves. You usually do it *when you first come in* prior to report" (Tr. II-182) (emphasis added); Lorna Harms: "Count each morning on or before *the beginning of your shift*" (Harms deposition, p. 23) (emphasis added); Donnita Rine: "The nurse has to sign them *at the beginning of her shift*" (Tr. II-181) (emphasis added)).

Right up to the time of trial, Ms. Parrish steadfastly maintained that she was the only nurse required to sign the sheet at the beginning of the shift while all other

nurses could do the count "at their leisure." (Plaintiff's Exhibit 2). At trial, she admitted the following question and answer:

> Q. Now, you have testified that you are the only nurse that was required to sign the narcotic sheet at the beginning of your shift and that the other nurses could do it at their leisure?
>
> A. Or when they wanted to. They weren't required to do at the beginning.

(Tr. II-97).

Parrish habitually failed to timely sign the narcotic sheet at the beginning of her shift even though she knew that it was important (Tr. II-28), and in spite of the fact that she was repeatedly given helpful reminders by Mrs. White, the Director of Nursing, to do the count at the beginning of her shift. (Tr. II-38).

Even more outrageous, Martha Duff, the charge nurse who worked the shift immediately preceding Ms. Parrish, testified that she observed Ms. Parrish signing the narcotics sheet without doing an actual count of the narcotics. (Tr. III-170-171). That, standing alone, is a "dischargeable offense." (Tr. III-60).

The overwhelming evidence at trial demonstrated that Rhonda Parrish was a "problem employee." Annette Guild, the Director of Nursing when Parrish first started at Riverview, testified that Parrish was inconsistent, unprofessional, did not follow doctor's orders, failed to follow instructions, and failed to supervise her nurses aides. (Guild Trial Deposition, pp. 15-23). In fact, Mrs. Guild, whom the Master found to be extremely credible,

testified that Parrish "could be a danger to residents." (Guild Trial Deposition, p. 27).

Mrs. Guild's replacement, Jaye Bennett White, testified about many of the identical issues raised by Mrs. Guild. For example, Mrs. White testified that Parrish (1) was abusive to patients (Tr. II-210); (2) was unprofessional (Tr. II-2028); (3) would watch television during her shift (Tr. II-207); (4) failed to complete necessary paperwork (Tr. II-209); (5) failed to supervise the nurses aides (Tr. II-210); (6) inappropriately presigned the medex (Tr. II-209); and (7) "was the only nurse who showed a habitual problem with not signing the narcotic sheet." (Tr. II-215). As a result of her poor work history and her habitual failure to do the narcotic count at the beginning of her shift, she was fired.

Incredibly, Parrish finds it significant that she was "Employee of the Month" several months before she was terminated. (Petition for Writ of Certiorari, p. 5). This point couldn't be more insignificant. Mr. Pino, the Director of Riverview, testified on cross-examination that the "Employee of the Month" was a "random drawing", literally drawn out of a hat. (Tr. I-57).[1] At footnote 5 of Parrish's Petition for Writ of Certiorari ("Petition for Writ"), Parrish alleges that Mr. Pino was "immediately impeached" on this point. That is a blatant misstatement of what actually occurred. Not only was Pino not

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[1] Parrish's Counsel: "So a lousy employee could be an Employee of the Month?"

Pino: "Possibly, yes."

Parrish's Counsel: "Purely at random?"

Pino: "Yes, sir."

impeached, he further testified that the "Employee of the Month", was "not based on skill or merit", but rather was "literally a random drawing with names in a hat." (Tr. I-79). There was *no* contradictory testimony.

Parrish also finds it significant that the "progressive discipline [policy] was suddenly abandoned in midstream." (Petition for Writ, p. 5). Once again, this point is insignificant. Riverview fired many *white* employees without following the disciplinary procedure: a white nurses aide was fired for failing to follow a direct order (Tr. II-219); a white maintenance worker was fired without benefit of the disciplinary procedure for poor work performance and receiving numerous phone calls (Tr. I-88); and a white nurses aide was fired without benefit of the disciplinary policy for poor job performance (Tr. I-80). In fact, even Katherine Bradley, the Director of Nursing's sister, was fired without benefit of the progressive disciplinary policy. The evidence at trial clearly established that Parrish was given more leniency and more warnings than many of the white employees.

Parrish is also critical of the Master for concluding that her failure to timely do the narcotic count, an important federally mandated company policy, was the last straw in a cumulative record of poor performance. (Petition for Writ, p. 6). Parrish's criticism of the Master on this point is because Pino allegedly "stated on five pretrial occasions, under oath, that the only reason for discharge was Ms. Parrish's failure to complete the form in a timely fashion." (Petition for Writ, p. 6). Parrish goes on, at footnote 7, to state that "no reference to this remarkable impeachment of the defense theory was made by the appellate panel, the District Judge, or the Master". What

Parrish failed to mention, however, is that this "remarkable impeachment" was never before the appellate panel, the District Judge, or the Master.

The alleged impeachment of Pino, acknowledged by Parrish in footnote 7 to have occurred at a "pretrial deposition", was never brought out at trial. This alleged "impeachment" was from a deposition and was never before the Master. Mr. Pino's trial testimony consists of well over 150 pages of transcript. Clearly, Plaintiff had ample opportunity to illicit needed information or impeach Mr. Pino. Respondent finds it remarkable to criticize the Master for failing to reference testimony that was never before him. To the contrary, Pino testified at trial that Parrish's prior work history played a factor in his decision to terminate her. (Tr. I-51-52). There was no impeachment of Mr. Pino on this point.

ARGUMENT

With the passage of Title VII, Congress announced that employers may not take race, sex, religion, or national origin into account in selecting, evaluating, or compensating employees. 42 U.S.C. § 2000e-2(a)(1) (1982).

Preliminarily, it is important to note that there are two distinct types of cases under Title VII: "single motive" or "pretext" cases and "dual" or "mixed motive" cases. The single motive or pretext cases are analyzed under the familiar three-part framework outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1918 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 420 U.S. 248, 101 S.Ct. 1089. The *McDonnell Douglas*

formula proceeds under the assumption that a single motive explains the employer's decision to take an employment action adverse to the plaintiff. *Haskins v. United States Dept. of the Army*, 808 F.2d 1192, 1197 (6th Cir. 1987). The shifting burdens of *McDonnell Douglas* are designed to determine which motive – the alleged unlawful discrimination or the employer's asserted nondiscriminatory justification – is the "true" reason for the employer's decision. *Terbovitz v. Fiscal Court of Adair County, Ky.*, 825 F.2d 111 (6th Cir. 1987).

The *McDonnell Douglas* formula is inapplicable, however, in dual or mixed motive cases. *Terbovitz*, 825 F.2d at 115. The United States Sixth Circuit Court of Appeals set forth in *Blalock v. Metals Trades, Inc.*, 775 F.2d 703 (6th Cir. 1985) the guidelines for analyzing a dual motive Title VII case, including the burdens which must be carried by the parties on the issue of causation. In a 'ual motive case, once the Plaintiff "presents direct evidence of discrimination", the causation standard, or "same decision" test of *Mt. Healthy City School Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), is applied. *Haskins*, 808 F.2d at 1197. Under the *Mt. Healthy* test, once a plaintiff has established that the illegal conduct was more likely than not a "motivating" or "substantial" factor in the employment decision, the defendant must be given the opportunity to show, by a preponderance of the evidence, that the same decision would have been reached in the absence of discrimination. *Haskins*, 808 F.2d at 1197. In the instant case, Petitioner completely ignores the distinction between single or mixed motive cases, and focuses instead on irrelevant semantical differences.

Under Title VII, a plaintiff may show unlawful discrimination through either direct or circumstantial evidence, or both. *Blalock*, 775 F.2d at 706-07. If a plaintiff attempts to show unlawful discrimination through circumstantial evidence only, or if the trial court does not believe the plaintiff's proffered direct evidence, then the evidentiary framework of *McDonnell Douglas* is the proper mode of analysis. *Terbovitz*, 825 F.2d at 115.

In the present case, there was no direct evidence of discrimination. This point is not in dispute. During the trial of this matter, arguing against a motion for directed verdict, plaintiff's counsel stated:

> In a race discrimination case like this obviously we are not required to prove our case by *direct evidence*. In this day and age it is difficult to find employers sufficiently naive that they would acknowledge openly racial stereotypic views or prejudice. I know it happens sometimes, but often you don't have racial remarks and so forth . . . [T]he law only requires us to show by *circumstantial evidence* that there was disparate treatment. In this case we have made our *prima facie case*. She was a member of the protected class, there was a job position. She was terminated.

(Tr. II-171-173) (emphasis added).

As can be seen, plaintiff's counsel readily admits there is no direct evidence of discrimination in this case. More telling, however, is that in order to avoid directed verdict, plaintiff's counsel argued the *McDonnell Douglas* formula (i.e. "we have made our prima facie case"). As there was no direct evidence of discrimination, the legal

standard that *must* be applied is the *McDonnell Douglas/ Burdine* formula. *Milligan-Jensen v. Michigan Technical Univ.*, 767 F.Supp. 1403 (W.D. Mich. 1971).

At page 14 of his Master's Report, Magistrate Judge Kemp stated:

> In this case, the legal standard relating to Parrish's claim that she was discharged in violation of Title VII is fully set forth on pages three through six of the Master's Report and Order which was filed on March 5, 1992. The Court will apply those same principals to the fact as they more fully appear from the record of the Master's Hearing.

B-15, Petitioner's Appendix.

In his March 5, 1992, Master's Report and Order, after a three page discussion of the legal standard to be applied, Magistrate Judge Kemp further stated:

> First, a claimant may, but need not, present direct evidence of an intent to discriminate. [Citation omitted]. If direct evidence of discrimination is presented, then the *McDonnell Douglas* analysis of a *prima facie* case is inapposite. [Citation omitted]. Otherwise, the claimant may make a circumstantial case of discrimination through the *McDonnell Douglas* prima facie case and through additional evidence that the nondiscriminatory reason advanced by the defendant is merely a pretext. [Citations omitted].

(Master's Report and Order, March 5, 1992, p. 5).

Petitioner was well aware of the legal standard to be applied by Magistrate Judge Kemp a full four months

prior to trial and never raised an objection. In fact, Petitioner was not only aware of the legal standard to be applied, she agreed with it. Petitioner's counsel, *in his opening statement*, isolated the issue as follows: "[T]he important question in the case; did Rhonda Parrish really violate a specific policy as to timing (sic) of signing the narcotics sheet, or is that something they made up as a *pretext*?" (Tr. I-15) (emphasis added).

Clearly, all parties agreed that the legal standard to be applied in this case was the *McDonnell Douglas* pretext formula. Under that formula, once the employer articulates a legitimate, non-discriminatory reason for the action taken, the plaintiff may succeed by either directly persuading "the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 101 S.Ct. at 1095. In the instant case, plaintiff did neither.

The plaintiff has attempted to argue that Magistrate Judge Kemp's legal standard was contrary to law. However, there are both Supreme Court and Sixth Circuit decisions that use the *exact same* language as used by Magistrate Judge Kemp. In his order, Magistrate Judge Kemp found that plaintiff failed to demonstrate that discrimination played "a substantial part" in her discharge. (Magistrate's Order, p. 29, Petitioner's Appendix, B-16). Plaintiff argues that the "*substantial factor*" language, used by Magistrate Judge Kemp, was a legal error as the correct burden requires use of the "*motivating factor*" language.

However, this Court has set forth the identical standard. In *Mt. Healthy*, the United States Supreme Court stated:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a *"substantial factor"* - ***or to put it in other words, that it was a "motivating factor"*** in the board's decision not to rehire him.

Mt. Healthy, 429 U.S. at 286 (emphasis added).

Justice White, in his concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) also noted *no* difference between the terms. Justice White stated:

> As in *Mt. Healthy*, the District Court found that the employer was motivated by both illegitimate and legitimate factors. And here, as in *Mt. Healthy*, and as the court now holds, *Hopkins* was not required to prove that the illegitimate factor was the only, principal, or true reason for the petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a ***substantial*** factor in the adverse employment action.

Price Waterhouse, 109 S.Ct. at 1795 (emphasis in original).

The Sixth Circuit likewise makes no distinction between "substantial" factor or "motivating" factor. See *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988) (["T]he plaintiff has the burden of proving that his speech was a 'substantial' or 'motivating' factor in employer's decision to terminate his employment"); *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064 (6th Cir. 1990) (" . . . if Mr. Canitia had been able to show that there was a

genuine issue as to whether his testimony . . . was a 'substantial' or 'motivating' factor in his discharge . . . "); *Proffitt v. Anacomp, Inc.*, 747 F.Supp. 421 (S.D. Ohio 1990) ("plaintiff need only demonstrate that gender was a *substantial motivating factor* in the employment decision . . . "); *Wilson v. Firestone Tire and Rubber Co.*, 932 F.2d 510 (6th Cir. 1991) (emphasis added) ("Under *Price Waterhouse*, such a burden on the defendant only arises where plaintiff presents direct evidence that unlawful discriminatory animus was a *substantial motivation* for the adverse action").

As can be clearly seen, the terms "substantial factor" or "motivating factor" are interchangeable. As plaintiff's entire objection regarding the legal standard utilized by Magistrate Judge Kemp is predicated on the distinction between these two terms, it must fail.

CONCLUSION

It is respectfully submitted that Petitioner has failed to establish any reason why the writ should be granted. In essence, Petitioner wants this Court to review the evidence so carefully considered by the Master. The Petition for a Writ of Certiorari should be denied.

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